No. 18-15

In the Supreme Court of the United States

JAMES L. KISOR,
Petitioner,

v.

ROBERT WILKIE,
SECRETARY OF VETERANS AFFAIRS,
Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

BRIEF OF AMICUS CURIAE JEREMY C. DOERRE IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE[1]

Amicus Curiae Jeremy C. Doerre is an attorney who believes that judicial review is an important check on administrative agency action. Amicus has no stake in any party or in the outcome of this case.

SUMMARY OF THE ARGUMENT

Petitioner asks whether this Court should overrule *Auer v. Robbins*[2] and *Bowles v. Seminole Rock & Sand Co.*[3]

As Justice Thomas has urged, judicial deference to agency interpretations of regulations may be "constitutionally questionable ... [because it]

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[1] No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than amicus curiae or amicus curiae's counsel made such a monetary contribution to the preparation or submission of this brief. All parties have provided written consent to the filing of this brief. A copy of written consent from the Petitioner was provided to the Clerk upon filing. Respondent has filed a paper providing blanket consent for filing of amicus briefs.

[2] *Auer v. Robbins*, 519 U.S. 452 (1997).

[3] *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945).

undermines the judicial 'check' on the political branches."[4] If this is so, and doctrinal judicial deference to agency interpretations of regulations "undermines [the judicial branch's] obligation to provide a judicial check on the other branches,"[5] then such doctrinal deference cannot be justified simply as a judicial choice to defer to agency expertise, and instead, regardless of any potential policy advantages, must be justified based on agency exercise of constitutional power.[6]

However, doctrinal judicial deference to agency interpretations of regulations cannot be justified based on agency exercise of judicial power, because even assuming *arguendo* that Congress has the authority to assign binding judicial interpretive power to administrative agencies, Congress has chosen not to do so, instead explicitly prescribing in the Administrative Procedure Act (APA) that a "reviewing court shall ... interpret ... statutory provisions, and

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[4] *Perez v. Mortgage Bankers Assn.*, 135 S. Ct. 1199, 1220 (2015) (Thomas, J., concurring in the judgment).

[5] *Perez*, 135 S. Ct. at 1213 (Thomas, J., concurring in the judgment).

[6] See *INS v. Chadha*, 462 U. S. 919, 945 (1983) ("policy arguments supporting even useful 'political inventions' are subject to the demands of the Constitution which defines powers and . . . sets out . . . how those powers are to be exercised.")

determine the meaning ... of the terms of an agency action."[7]

Further, while judicial deference to an agency interpretation of a legislative statute or regulation can potentially be justified based on agency exercise of delegated legislative power, the current doctrine of broad *Auer* deference, under which the Federal Circuit felt compelled to "defer to an agency's interpretation of its own regulation 'as long as the regulation is ambiguous and the agency's interpretation is neither plainly erroneous nor inconsistent with the regulation,'"[8] cannot.

As a first matter, even assuming *arguendo* that legislative intent may properly be considered in interpreting a regulation, broad *Auer* deference cannot be justified based on agency "special insight into its intent when"[9] it exercised its delegated legislative power to promulgate a regulation. This is the case because such deference has been applied even where there was clearly no special insight into agency

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[7] 5 U.S.C. § 706.

[8] Pet. App. 15a (quoting *Gose v. U.S. Postal Serv.*, 451 F.3d 831, 836 (Fed. Cir. 2006) (citing *Gonzales v. Oregon*, 546 U.S. 243 (2006); *Christensen v. Harris Cty.*, 529 U.S. 576, 588 (2000); *Seminole Rock*, 325 U.S. at 413–414)).

[9] *Decker v. Northwest Environmental Defense Center*, 568 U.S. 597, 618 (2013) (Scalia, J., concurring in part and dissenting in part).

intent,[10] and even where agency intent appears to have changed.[11] This is also the case because subsequent agency views regarding a prior regulation enacted with delegated legislative power should be given no more deference than subsequent congressional views regarding a prior statute enacted with that same legislative power.[12]

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[10] See *Perez*, 135 S. Ct. at 1223 (Thomas, J., concurring in the judgment) ("This Court has afforded *Seminole Rock* deference to agency interpretations even when the agency was not the original drafter." (citing *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 696–698 (1991))).

[11] See *Perez*, 135 S. Ct. at 1223 (Thomas, J., concurring in the judgment) ("[This Court] has likewise granted *Seminole Rock* deference to agency interpretations that are inconsistent with interpretations adopted closer in time to the promulgation of the regulations." (citing *Long Island Care at Home, Ltd. v. Coke*, 551 U. S. 158, 170–171 (2007))).

[12] See, e.g., *Public Employees Retirement System of Ohio v. Betts*, 492 U.S. 158, 168 (1989) ("We have observed on more than one occasion that the interpretation given by one Congress (or a committee or Member thereof) to an earlier statute is of little assistance in discerning the meaning of that statute."); *United States v. Mine Workers*, 330 U.S. 258, 281 (1947) (Views "expressed eleven years after the Act was passed [] cannot be accorded even the same weight as if made by the same individuals in the course of the Norris-LaGuardia debates.")

Further, broad *Auer* deference cannot be justified based on subsequent agency "exercise of delegated lawmaking powers... [to] lawmak[e] by interpretation,"[13] as it allows post hoc agency interpretations proffered during adjudication to have retroactive effect even where they cannot represent an "exercise of delegated lawmaking powers"[14] "consistent with the authority granted by Congress"[15] because Congress did not delegate legislative "power to promulgate retroactive rules."[16]

Accordingly, if broad *Auer* deference cannot be justified simply as a judicial choice to defer to agency expertise, and cannot be justified based on agency exercise of judicial or legislative power, Amicus would urge that this Court overrule the current doctrine of broad *Auer* deference under which the Federal Circuit felt compelled to "defer to [the VA's] interpretation of its own regulation 'as long as the regulation is ambiguous and the agency's interpretation is neither

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[13] *Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 154 (1991) (citing *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 292-294 (1974); *SEC v. Chenery Corp.*, 332 U.S. 194, 201-203 (1947)).

[14] *Martin*, 499 U.S. at 154.

[15] *SEC v. Chenery Corp.*, 332 U.S. 194, 207 (1947).

[16] *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988).

plainly erroneous nor inconsistent with the regulation.'"[17]

ARGUMENT

I. If doctrinal judicial deference to agency interpretations of legislative statutes or regulations "undermines [the judicial branch's] obligation to provide a judicial check on the other branches,"[18] then it cannot be justified simply as a judicial choice to defer to agency expertise, and instead must be justified based on agency exercise of executive, judicial, or legislative power.

"[T]he 'essential balance' of the Constitution is that the Legislature is 'possessed of power to 'prescrib[e] the rules by which the duties and rights of every citizen are to be regulated,' but the power of '[t]he

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[17] Pet. App. 15a (quoting *Gose v. U.S. Postal Serv.*, 451 F.3d 831, 836 (Fed. Cir. 2006) (citing *Gonzales v. Oregon*, 546 U.S. 243 (2006); *Christensen v. Harris Cty.*, 529 U.S. 576, 588 (2000); *Seminole Rock*, 325 U.S. at 413–414)).

[18] *Perez v. Mortgage Bankers Assn.*, 135 S. Ct. 1199, 1213 (2015) (Thomas, J., concurring in the judgment).

interpretation of the laws' [it] 'the proper and peculiar province of the courts.'"[19]

This judicial power of "'[t]he interpretation of the laws'"[20] allows the judicial branch to "provide a judicial check on the other branches."[21]

As Justice Thomas has urged,[22] judicial deference to agency interpretations may be "constitutionally questionable ... [because it] undermines the judicial 'check' on the political branches."[23] If this is so, and doctrinal judicial deference to agency interpretations of legislative statutes or regulations "undermines [the judicial branch's] obligation to provide a judicial check on the other branches,"[24] then such doctrinal

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[19] *Perez*, 135 S. Ct. at 1224 (Thomas, J., concurring in the judgment) (quoting *Plaut v. Spendthrift Farm, Inc.*, 514 U. S. 211, 222 (1995) (citation omitted; third brackets added)).

[20] *Perez*, 135 S. Ct. at 1224 (Thomas, J., concurring in the judgment) (quoting *Plaut*, 514 U. S. at 222 (citation omitted)).

[21] *Perez*, 135 S. Ct. at 1213 (Thomas, J., concurring in the judgment).

[22] In the context of judicial deference to agency interpretations of regulations.

[23] *Perez*, 135 S. Ct. at 1220 (Thomas, J., concurring in the judgment).

[24] *Perez*, 135 S. Ct. at 1213 (Thomas, J., concurring in the judgment).

deference cannot be justified simply as a judicial choice to defer to agency expertise.

Instead, because "policy arguments supporting even useful 'political inventions' are subject to the demands of the Constitution which defines powers and . . . sets out . . . how those powers are to be exercised,"[25] any doctrine of judicial deference to agency interpretations of statutes or regulations must be justified based on identifiable constitutional power assigned to an agency.

In this regard, "[t]he Constitution sought to divide the delegated powers of the new Federal Government into three defined categories, Legislative, Executive, and Judicial, to assure, as nearly as possible, that each branch of government would confine itself to its assigned responsibility."[26] This Court has indicated that "[a]lthough not 'hermetically' sealed from one another, ... the powers delegated to the three Branches are functionally identifiable."[27] In accord with this, any constitutional power exercised by an agency justifying judicial deference to agency interpretations of a statute or regulation should be identifiable as legislative, executive, or judicial in nature.

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[25] *INS v. Chadha*, 462 U. S. 919, 945 (1983); see also *Perez*, 135 S. Ct. at 1223 (Thomas, J., concurring in the judgment) (quoting *Chadha*, 462 U. S. at 945).

[26] *Chadha*, 462 U.S. at 951.

[27] *Chadha*, 462 U.S. at 951.

Overall, if doctrinal judicial deference to agency interpretations of legislative statutes or regulations "undermines [the judicial branch's] obligation to provide a judicial check on the other branches,"[28] then it cannot be justified simply as a judicial choice to defer to agency expertise, and instead must be justified based on agency exercise of executive, judicial, or legislative power.

II. Doctrinal judicial deference to agency interpretations of legislative statutes or regulations cannot be justified based on agency exercise of judicial power.

Turning first to judicial power, Amicus respectfully submits that a doctrine of judicial deference to agency interpretations of legislative statutes or regulations cannot be justified based on agency exercise of judicial power.

A. It is not clear that Congress has the authority to assign binding judicial interpretive power to administrative agencies.

In this regard, Justice Thomas has observed that "the Constitution does not empower Congress to issue

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[28] *Perez*, 135 S. Ct. at 1213 (Thomas, J., concurring in the judgment).

a judicially binding interpretation of the Constitution or its laws," and urged that "[l]acking the power itself, [Congress] cannot delegate that power to an agency."[29] Thus, it is questionable whether Congress has the authority to assign binding judicial interpretive power to administrative agencies.

B. Even assuming *arguendo* that Congress has the authority to assign binding judicial interpretive power to administrative agencies, Congress has chosen not to do so, instead explicitly prescribing that a "reviewing court shall ... interpret ... statutory provisions, and determine the meaning ... of the terms of an agency action."[30]

Notably, however, it is not even necessary to reach this issue in addressing the present matter, as even assuming *arguendo* that Congress has the authority to assign binding judicial interpretive power to administrative agencies, it is still clear that Congress has chosen not to do so.

This can be clearly seen in that far from attempting to assign binding judicial interpretive power to administrative agencies, Congress has

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[29] *Perez*, 135 S. Ct. at 1220 (Thomas, J., concurring in the judgment).

[30] 5 U.S.C. § 706.

instead explicitly prescribed that a "reviewing court shall ... interpret ... statutory provisions, and determine the meaning ... of the terms of an agency action."[31]

In this regard, an "agency action" includes an agency regulation or rule, as it is defined to "include[] the whole or a part of an agency rule."[32]

Thus, doctrinal judicial deference to agency interpretations of legislative statutes or regulations cannot be justified based on agency exercise of judicial power at least because, even assuming *arguendo* that Congress has the authority to assign binding judicial interpretive power to administrative agencies, Congress has chosen not to do so,[33] instead explicitly prescribing that a "reviewing court shall ... interpret ... statutory provisions, and determine the meaning ... of the terms of an agency [rule]."[34]

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[31] 5 U.S.C. § 706.

[32] 5 U.S.C. § 551(13); see 5 U.S.C. § 701(b) ("For the purpose of this chapter... 'person', 'rule', 'order', 'license', 'sanction', 'relief', and 'agency action' have the meanings given them by section 551 of this title.")

[33] Notably, this was not as clear at the time that this Court decided *Seminole Rock*, as that decision predated enactment of the Administrative Procedure Act.

[34] 5 U.S.C. § 706; see 5 U.S.C. § 551(13); see also 5 U.S.C. § 701(b).

III. While judicial deference to an agency interpretation of a legislative statute or regulation can be justified based on agency exercise of delegated legislative power, the current doctrine of broad *Auer* deference cannot.

Turning to legislative power, it is necessary to differentiate between judicial deference to an agency's interpretations of Congressional statutes, and judicial deference to an agency's interpretations of its own regulations or rules. In this regard, although the issue of *Chevron* deference is not currently before this Court, it is useful to briefly discuss it for contextual and contrastive purposes.

A. Granting *Chevron* deference to agency interpretations of statutes can be, and has been, justified based on agency exercise of delegated legislative power.

In *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*,[35] this Court discussed delegation of legislative authority to an administrative agency, noting that "[i]f Congress has explicitly left a gap for the agency to fill, there is an express delegation of

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[35] *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

authority to the agency to elucidate a specific provision of the statute by regulation."[36] This Court indicated that "[s]uch legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute."[37]

This Court further observed that "[s]ometimes the legislative delegation to an agency on a particular question is implicit, rather than explicit," and held that such an implicit delegation of legislative power to an agency still requires that its regulations be given controlling weight such that "a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency."[38]

Thus, although the APA commands that a "reviewing court shall ... interpret ... statutory provisions, and determine the meaning ... of the terms of an agency action,"[39] *Chevron* deference to agency interpretation of statutes via promulgated regulations can be, and has been, justified based on agency exercise of delegated legislative power to promulgate such regulations.

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[36] *Chevron*, 467 U.S. at 843-844.

[37] *Chevron*, 467 U.S. at 844.

[38] *Chevron*, 467 U.S. at 844.

[39] 5 U.S.C. § 706.

B. Granting broad *Auer* deference to agency interpretations of an agency regulation cannot be justified based on agency exercise of delegated legislative power.

It has been suggested that, just as *Chevron* deference to agency interpretations can be justified based on agency exercise of delegated legislative power, "power authoritatively to interpret its own regulations is a component of the agency's delegated lawmaking powers."[40] Considering this proposition requires considering possible rationales therefore.

It has been observed, in considering judicial deference to administrative interpretations, that "[a]n ambiguity in a statute committed to agency implementation can be attributed to either of two congressional desires: (1) Congress intended a particular result, but was not clear about it; or (2) Congress had no particular intent on the subject, but meant to leave its resolution to the agency."[41]

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[40] *Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 151 (1991).

[41] Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 38 Duke L.J. 511, 516 (1989). Justice Scalia further observed that "the pre-*Chevron* decisions sought to choose between (1) and (2) on a statute-by-statute basis," but that "*Chevron*... replaced this statute-by-statute evaluation ... with an across-the-

Analogously, "[a]n ambiguity in a [regulation] ... can be attributed to either of two [agency] desires: (1) [the agency] intended a particular result, but was not clear about it; or (2) [the agency] had no particular intent on the subject, but meant to leave its resolution to the agency"[42] in the future.

In the first situation, where an agency "intended a particular result, but was not clear about it,"[43] it is possible "that the agency, as the drafter of the rule, will have some special insight into its intent when enacting it."[44] It has been suggested that an agency has "special authority to interpret its own words"[45] based on such "special insight into its intent when"[46] it exercised its delegated legislative power.

In the second situation, however, where the agency "had no particular intent on the subject, but meant to leave its resolution to the agency"[47] in the future, any

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board presumption that, in the case of ambiguity, agency discretion is meant." *Id.*

[42] Scalia, *supra* at 516.

[43] Scalia, *supra* at 516.

[44] *Decker v. Northwest Environmental Defense Center*, 568 U.S. 597, 618 (2013) (Scalia, J., concurring in part and dissenting in part).

[45] *Gonzales v. Oregon*, 546 U.S. 243, 257 (2006).

[46] *Decker*, 568 U.S. at 618 (Scalia, J., concurring in part and dissenting in part).

[47] Scalia, *supra* at 516.

agency "special authority to interpret its own words"[48] cannot be based on "special insight into its intent when"[49] previously exercising delegated legislative power. Instead, any "power authoritatively to interpret its own regulations [that represents] a component of the agency's delegated lawmaking powers"[50] could only be based on agency exercise of delegated legislative power to legislate a new rule, e.g. "the exercise of delegated lawmaking powers... [to] lawmak[e] by interpretation."[51]

i. **Even assuming *arguendo* that legislative intent may properly be considered in interpreting a regulation, broad *Auer* deference cannot be justified based on agency "special insight into its intent when"[52] it exercised its delegated legislative power to promulgate a regulation.**

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[48] *Gonzales*, 546 U.S. at 257.

[49] *Decker*, 568 U.S. at 618 (Scalia, J., concurring in part and dissenting in part).

[50] *Martin*, 499 U.S. at 151.

[51] *Martin*, 499 U.S. at 154.

[52] *Decker*, 568 U.S. at 618 (Scalia, J., concurring in part and dissenting in part).

As outlined above, it has been suggested that an agency has "special authority to interpret its own words"[53] based on "special insight into its intent when"[54] it exercised its delegated legislative power to promulgate a regulation.

As a first matter, it is worth noting that there is a legitimate question as to whether, and if so to what extent, a legislator's intent should be taken into consideration in interpreting a legislative statute or regulation.

In this regard, it has been observed that "[c]itizens arrange their affairs not on the basis of their legislators' unexpressed intent, but on the basis of the law as it is written and promulgated,"[55] and that "'[t]o be governed by legislated text rather than legislators' intentions is what it means to be 'a Government of laws, not of men.'"[56] In accord with this, it has been suggested that "'[W]e do not inquire what the legislature meant; we ask only what the statute

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[53] *Gonzales*, 546 U.S. at 257.

[54] *Decker*, 568 U.S. at 618 (Scalia, J., concurring in part and dissenting in part).

[55] *Perez*, 135 S. Ct. at 1224 (Thomas, J., concurring in the judgment) (quoting *Zuni Public School Dist. No. 89 v. Department of Education*, 550 U. S. 81, 119 (2007) (Scalia, J., dissenting)).

[56] *Perez*, 135 S. Ct. at 1224 (Thomas, J., concurring in the judgment) (quoting *Zuni*, 550 U. S. at 119 (Scalia, J., dissenting)).

means,'"[57] and that "[w]hether governing rules are made by the National Legislature or an administrative agency, we are bound by what they say, not by the unexpressed intention of those who made them."[58]

Based on this, it has been suggested that with respect to any argument that an agency has "special authority to interpret its own words"[59] based on such "special insight into its intent when"[60] it exercised its delegated legislative power, "[t]he implied premise of this argument--that what we are looking for is the agency's intent in adopting the rule--is false."[61]

However, even assuming *arguendo* that legislative intent may properly be considered in interpreting a regulation, the current doctrine of broad *Auer* deference still cannot be justified based on agency "special insight into its intent when"[62] it exercised its delegated legislative power to promulgate a regulation.

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[57] *Decker*, 568 U.S. at 618 (Scalia, J., concurring in part and dissenting in part).

[58] *Id.*

[59] *Gonzales*, 546 U.S. at 257.

[60] *Decker*, 568 U.S. at 618 (Scalia, J., concurring in part and dissenting in part).

[61] *Id.*

[62] *Id.*

a. Broad *Auer* deference has been applied where there was clearly no "special insight into [agency] intent,"[63] and where agency intent appears to have changed.

As has been observed by Justice Thomas, with respect to such a justification for deference based on agency "special insight into its intent"[64] when drafting a regulation, "[t]his justification rings hollow[] [because] [t]his Court has afforded *Seminole Rock* deference to agency interpretations even when the agency was not the original drafter."[65] In particular, this Court "appl[ied] *Seminole Rock* deference to one agency's interpretation of another agency's regulations because Congress had delegated authority to both to administer the program."[66] Thus, broad

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[63] *Decker*, 568 U.S. at 618 (Scalia, J., concurring in part and dissenting in part).

[64] *Id.*

[65] *Perez*, 135 S. Ct. at 1223 (Thomas, J., concurring in the judgment) (citing *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 696–698 (1991)).

[66] *Perez*, 135 S. Ct. at 1223 (Thomas, J., concurring in the judgment).

Auer deference has been applied even where there was clearly no "special insight into [agency] intent."[67]

Further, broad *Auer* deference has been applied where intent appears to have changed in that this Court "has likewise granted *Seminole Rock* deference to agency interpretations that are inconsistent with interpretations adopted closer in time to the promulgation of the regulations."[68]

Thus, broad *Auer* deference cannot be justified simply based on agency "special insight into its intent when"[69] it exercised its delegated legislative power to promulgate a regulation because such deference has been applied even where there was clearly no "special insight into [agency] intent,"[70] and even where agency intent appears to have changed.

b. Subsequent agency views regarding a prior regulation enacted with delegated legislative power should be given no more deference than

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[67] *Decker*, 568 U.S. at 618 (Scalia, J., concurring in part and dissenting in part).

[68] *Perez*, 135 S. Ct. at 1223 (Thomas, J., concurring in the judgment) (citing *Long Island Care at Home, Ltd. v. Coke*, 551 U. S. 158, 170–171 (2007)).

[69] *Decker*, 568 U.S. at 618 (Scalia, J., concurring in part and dissenting in part).

[70] *Id.*

subsequent congressional views regarding a prior statute enacted with that same legislative power.

Further, "[e]ven if the scope of *Seminole Rock* deference more closely matched the original-drafter justification, it would still fail."[71]

In this regard, this Court has cautioned that "'the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one'," [72] and has "observed on more than one occasion that the interpretation given by one Congress (or a committee or Member thereof) to an earlier statute is of little assistance in discerning the meaning of that statute."[73]

Given that this Court declines to grant controlling weight to the views of a later Congress regarding a statute passed by a prior Congress exercising its legislative power, this same legislative power cannot possibly justify granting controlling weight to the views of a subsequent administration regarding a

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[71] *Perez*, 135 S. Ct. at 1223 (Thomas, J., concurring in the judgment).

[72] *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 117-18 (1980) (quoting *United States v. Price*, 361 U.S. 304, 313 (1960)).

[73] *Public Employees Retirement System of Ohio v. Betts*, 492 U.S. 158, 168 (1989).

regulation enacted by a prior administration pursuant to this delegated legislative power.

This Court has suggested that granting controlling weight to subsequently expressed views is inappropriate even when the same individuals are involved, suggesting in one instance that views "expressed eleven years after the Act was passed [] cannot be accorded even the same weight as if made by the same individuals in the course of [prior] debates."[74]

Here, just as "the interpretation given by one Congress (or a committee or Member thereof) to an earlier statute is of little assistance in discerning the meaning of that statute,"[75] a subsequent interpretation given by an agency to an earlier regulation is of little assistance in discerning the meaning of that regulation. And yet, *Auer* deference has been granted to "agency interpretations that are inconsistent with interpretations adopted closer in time to the promulgation of [] regulations."[76]

Overall, if this Court declines to grant controlling weight to subsequent congressional views regarding a

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[74] *United States v. Mine Workers*, 330 U.S. 258, 281 (1947).

[75] *Public Employees Retirement System of Ohio v. Betts*, 492 U.S. 158, 168 (1989).

[76] *Perez*, 135 S. Ct. at 1223 (Thomas, J., concurring in the judgment) (citing *Long Island Care*, 551 U. S. at 170–171).

statute passed by Congress exercising its legislative power, this same legislative power cannot possibly justify granting controlling weight to the subsequent views of an agency regarding a regulation enacted exercising this delegated legislative power.

That is, even assuming *arguendo* that legislative intent may properly be considered in interpreting a regulation, subsequent agency views regarding a prior regulation enacted with delegated legislative power should be given no more deference than subsequent congressional views regarding a prior statute enacted with that same legislative power.

ii. Broad *Auer* deference cannot be justified based on subsequent agency "exercise of delegated lawmaking powers... [to] lawmak[e] by interpretation"[77] because it allows post hoc agency interpretations to have retroactive effect even where Congress did not delegate legislative "power to promulgate retroactive rules."[78]

Further, a conclusion that an agency has "power authoritatively to interpret its own regulations [as] a

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[77] *Martin*, 499 U.S. at 154.

[78] *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988).

component of the agency's delegated lawmaking powers"[79] cannot be based on agency exercise of delegated legislative power to legislate a new rule, e.g. "the exercise of delegated lawmaking powers... [during adjudication to] lawmak[e] by interpretation."[80]

This Court has indicated that agency "adjudication operates as an appropriate mechanism not only for factfinding, but also for the exercise of delegated lawmaking powers, including lawmaking by interpretation."[81]

Notably, however, this Court has made clear that such "lawmaking by interpretation"[82] during adjudication is a "permissible mode of lawmaking and policymaking only because the unitary agencies in question also had been delegated the power to make law and policy through rulemaking,"[83] and is permissible only when it is "consistent with the authority granted by Congress."[84]

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[79] *Martin*, 499 U.S. at 151.

[80] *Martin*, 499 U.S. at 154.

[81] *Martin*, 499 U.S. at 154 (citing *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 292-294 (1974); *SEC v. Chenery Corp.*, 332 U.S. 194, 201-203 (1947)).

[82] *Martin*, 499 U.S. at 154.

[83] *Martin*, 499 U.S. at 154 (citing *Bell Aerospace*, 416 U.S. at 292-294 (1974); *Chenery*, 332 U.S. at 202-203).

[84] *Chenery*, 332 U.S. at 207.

In this regard, this Court has indicated that "a statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms."[85] As "lawmaking by interpretation"[86] during adjudication is a "permissible mode of lawmaking and policymaking only because the [] agencies ... ha[ve] been delegated the power to make law and policy through rulemaking,"[87] if an agency lacks the "power to promulgate retroactive rules,"[88] then any "exercise of delegated lawmaking powers [during adjudication], including lawmaking by interpretation,"[89] is similarly limited.

Consequently, while an agency may arrive at a new interpretation during adjudication that represents a proper "lawmaking by interpretation,"[90] absent agency "power to promulgate retroactive

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[85] *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988).

[86] *Martin*, 499 U.S. at 154.

[87] *Martin*, 499 U.S. at 154 (citing *Bell Aerospace*, 416 U.S. at 292-294 (1974); *Chenery*, 332 U.S. at 202-203).

[88] *Bowen*, 488 U.S. at 208.

[89] *Martin*, 499 U.S. at 154 (citing *Bell Aerospace*, 416 U.S. at 292-294; *Chenery*, 332 U.S. at 201-203).

[90] *Martin*, 499 U.S. at 154.

rules,"[91] such new interpretation is only effective as an exercise of delegated legislative power prospectively, and cannot be relied on retroactively to justify an agency conclusion in the adjudication.

The agency might still base a conclusion in the adjudication on that interpretation, but for purposes of retroactive application in such adjudication, that interpretation would not represent an "exercise of delegated lawmaking powers"[92] "consistent with the authority granted by Congress"[93] if the agency does not have the "power to promulgate retroactive rules."[94] Any attempt by the agency to justify its decision based on retroactive application of such newly pronounced rule would be improper, as retroactive application of the newly announced rule would not be "consistent with the authority granted by Congress."[95]

Instead, for purposes of that proceeding, and judicial review thereof, the newly announced interpretation should be granted "a measure of deference proportional to the ' 'thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements,

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[91] *Bowen*, 488 U.S. at 208.

[92] *Martin*, 499 U.S. at 154.

[93] *Chenery*, 332 U.S. at 207.

[94] *Bowen*, 488 U.S. at 208.

[95] *Chenery*, 332 U.S. at 207.

and all those factors which give it power to persuade.'"[96] In subsequent proceedings, where retroactive application is not at issue, it may properly be considered as a rule representing an "exercise of delegated lawmaking powers."[97]

This is in accord with this Court's observation in *Christopher v. SmithKline Beecham Corp.* that "[i]t is one thing to expect regulated parties to conform their conduct to an agency's interpretations once the agency announces them; it is quite another to require regulated parties to divine the agency's interpretations in advance or else be held liable when the agency announces its interpretations for the first time in an [adjudicatory] proceeding and demands deference."[98]

Importantly, this Court in *Seminole Rock* was not faced with such potential problems posed by post hoc interpretations, as this Court looked to "a bulletin issued by the Administrator concurrently with [a] Regulation"[99] in order to determine the administrative interpretation of that regulation. In

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[96] *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 159 (2012) (quoting *United States v. Mead Corp.*, 533 U.S. 218, 228 (2001) (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944))).

[97] *Martin*, 499 U.S. at 154.

[98] *Christopher*, 567 U.S. at 158-159.

[99] *Seminole Rock*, 325 U.S. at 417.

the seventy plus years since, however, this Court's suggestion in *Seminole Rock* that "the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation"[100] has evolved into a doctrine of broad *Auer* deference under which a court "will enforce an agency's interpretation of its own rules unless that interpretation is 'plainly erroneous or inconsistent with the regulation.'"[101]

In *Christopher v. SmithKline Beecham Corp.*, this Court noted the problem that post hoc interpretations can "'frustrat[e] the notice and predictability purposes of rulemaking,'"[102] but rather than having occasion to address "the general merits of *Auer* deference,"[103]

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[100] *Seminole Rock*, 325 U.S. at 414.

[101] *Decker*, 568 U.S. at 617 (Scalia, J., concurring in part and dissenting in part) (quoting *Seminole Rock*, 325 U.S. at 414); see also Pet. App. 15a ("we defer to an agency's interpretation of its own regulation 'as long as the regulation is ambiguous and the agency's interpretation is neither plainly erroneous nor inconsistent with the regulation.'" (quoting *Gose v. U.S. Postal Serv.*, 451 F.3d 831, 836 (Fed. Cir. 2006)).

[102] *Christopher*, 567 U.S. at 158 (quoting *Talk America, Inc. v. Michigan Bell Telephone Co.*, 564 U.S. 50, 69 (2011) (Scalia, J., concurring)).

[103] *Christopher*, 567 U.S. at 159.

simply found "*Auer* deference... [to be] unwarranted here."[104]

Amicus respectfully submits, however, that this narrow exception suggests reason to question the broader doctrine. In particular, broad *Auer* deference allows post hoc agency interpretations proffered during adjudication to have retroactive effect even where Congress did not delegate legislative power to promulgate retroactive rules.[105] In this regard, post

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[104] *Christopher*, 567 U.S. at 159.

[105] Relatedly, Amicus would suggest that broad *Auer* deference risks sanctioning use of post hoc agency interpretations proffered during adjudication as retroactive rules, risking undermining the APA's setup under which "'[r]ulemaking is agency action which regulates the future conduct of either groups of persons or a single person,'" while "'[c]onversely, adjudication is concerned with the determination of past and present rights and liabilities.'" *Bowen*, 488 U.S. at 218-219 (Scalia, J., concurring) (quoting 1947 Attorney General's Manual on the Administrative Procedure Act, 13-14). "The first part of the APA's definition of 'rule' states that a rule 'means the whole or a part of an agency statement of general or particular applicability *and future effect* ...,' [and] [t]he only plausible reading of the italicized phrase is that rules have legal consequences only for the future." *Bowen*, 488 U.S. at 216 (Scalia, J., concurring) (quoting 5 U.S.C. § 551(4)). Even assuming *arguendo* that retroactive rulemaking may sometimes be proper, broad judicial sanctioning risks undermining the APA, as "'[t]he entire

hoc agency interpretations proffered during adjudication cannot represent an "exercise of delegated lawmaking powers"[106] "consistent with the authority granted by Congress"[107] where Congress did not delegate legislative "power to promulgate retroactive rules."[108]

Thus, broad *Auer* deference cannot be justified based on subsequent agency "exercise of delegated lawmaking powers... [to] lawmak[e] by interpretation,"[109] as it allows post hoc agency interpretations proffered during adjudication to have retroactive effect even where they cannot represent an "exercise of delegated lawmaking powers"[110] "consistent with the authority granted by Congress"[111] because Congress did not delegate legislative "power to promulgate retroactive rules."[112]

Act is based upon [this] dichotomy between rulemaking and adjudication.'" *Bowen*, 488 U.S. at 218-219 (Scalia, J., concurring) (quoting 1947 Attorney General's Manual on the Administrative Procedure Act, 13-14).

[106] *Martin*, 499 U.S. at 154.

[107] *Chenery*, 332 U.S. at 207.

[108] *Bowen*, 488 U.S. at 208.

[109] *Martin*, 499 U.S. at 154.

[110] *Martin*, 499 U.S. at 154.

[111] *Chenery*, 332 U.S. at 207.

[112] *Bowen*, 488 U.S. at 208.

CONCLUSION

Amicus urges this Court to overrule the current doctrine of broad *Auer* deference under which the Federal Circuit felt compelled to "defer to [the VA's] interpretation of its own regulation 'as long as the regulation is ambiguous and the agency's interpretation is neither plainly erroneous nor inconsistent with the regulation.'"[113]

Respectfully submitted,

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[113] Pet. App. 15a (quoting *Gose*, 451 F.3d at 836).